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The hearing officer in european competition proceedings and the right to be heard

THE HEARING OFFICER IN EUROPEAN COMPETITION PROCEEDINGS AND THE RIGHT TO BE HEARD

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INTRODUCTION

PARAGRAPH 1: The Hearing Officer: Independence, transparency and objectivity

PARAGRAPH 2: The right to be heard: a general principle of the Union's law

Statement of Objections

Access to file

Replies to the SO

Oral hearings

Other involved parties, complainants and third parties

CONCLUSIONS

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INTRODUCTION

The article refers to the right to be heard that represents a general principle of European Union law as established by the Union's case law.

The work analyses how the right to be heard is being complied with by the European Commission during its administrative proceedings; in particular, the reference is to the European competition proceedings.

Commission decision 462/2001/EC obliges the Commission to ensure the respect of the right to be heard, "having regard, in particular, to the Charter of Fundamental Rights of European Union"[2].

After being appointed by the European Commission, the hearing officer (here in after the HO) shall ensure the effective exercise of the right to be heard in competition proceedings by means of a final report.

The analysis in question will consider only competition proceedings involving the HO, by excluding, consequently, state aids; given the differences characterising competition proceedings under the scrutiny of the HO, a separate reference shall be made for antitrust and merger cases when such differences come out.

The research is based on both European legislation and the Union's case law[3]; also the HO' s final reports published in the Official Journal of the European Union are considered, given the special position owned by the HO in the safeguard of the right to be heard.

The right to be heard has a double dimension in which the HO is always involved.

A first dimension allows parties to know Commission's allegations by means of the statement of objections (here in after SO) and access to file. Under the latter point of view a Commission Notice has been issued[4].

A second dimension allows parties to reply through written answers and oral hearings.

After describing the right to be heard as a general principle of the Union's law, such right shall be analysed in relation to all the dimensions characterising it.

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[2] Commission decision 462/2001/EC of 23/05/2001 on the terms of reference of hearing officers in certain competition proceedings.

[3] In performing his duties, *ex* art 3 (1) of the Commission decision 462/2001/EC the HO shall take account of the need for effective application of the competition rules in accordance with the Community legislation in force and jurisprudential principles. European Commission, The hearing office, Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU (*ex* articles 81 and 82 EC), is also useful given that it is based on the experience of the Hearing Officers in the application of legislation and jurisprudence.

[4] The reference is to the Commission Notice of 13 December 2005 on the rule for access to the Commission file in cases pursuant to articles 81 and 82 of the EC Treaty, articles 53, 54 and 57 of the EEA Agreement and Council Regulation No 139/2004 (here in after Commission notice for access to file).

Besides, it shall be specifically highlighted the position held by complainants, other involved parties and interested third parties with reference to the same right.

It is useful to underline that in the previous Commission decision the right of defence was considered the object of the HO's control[5]. While the right to be heard is the core of the parties' right of defence, also the right to avoid self incrimination and the legal privilege have been considered part of it[6], as well as the right to be assisted by a lawyer[7]. Now that the reference is to the right to be heard rather than the right of defence, the HO's control refers also to third parties participating in the proceedings in order to safeguard their interests.

PARAGRAPH 1: The Hearing Officer: Independence, transparency and objectivity

In all competition cases the European Commission plays the role of investigator, prosecutor and decision maker[8]; that is why the HO is particularly important at making adversary proceedings more objective[9].

Initially, in 1982, the institution of the HO represented a reply of the European Commission to criticism coming from outside about its ambiguous position; the contextual role of investigator, public prosecutor and decision maker led to the lack of objectivity in the procedure[10].

The adoption of the American system implied a European Commission keeping the role both of investigator and of public prosecutor in adversarial proceedings with the parties before an independent judge; that alternative required a deep revision of the present system, needing, at the same time, a political choice.

Another possibility was to separate the role of the investigator from the public prosecutor's role, giving both functions to different people inside DG competition; anyway, the latter solution involved more personnel than that requested by the creation of the HO[11].

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[5] Here the reference is to the Commission decision 94/810/ECSC, EC repealed by Commission decision 462/2001/EC.

[6] T 112/98, Mannesmannrohren Werke AG / Commission, [2001] ECR II-729, 60 – 67; C 155/79, A. M. & S Europe / Commission, [1982] ECR 1575, 23.

[7] C 46/87 & 227/88, Hoechst AG / Commission, [1989] ECR 2859, 16, observing that the right to legal representation must be respected from the investigation.

[8] C. D. Ehlermann, B. J. Drijber, Legal protection of enterprises: administrative procedure, in particular access to files and confidentiality, 1996, 7 ECLR.

[9] In the Italian system there is not a correspondent of the HO.

[10] EC Commission XI Report on competition policy (Commission 1981), 26, 27. EC Commission XII Report on competition policy (Commission 1982), 36, 37.

[11] C. D. Ehlermann, B. J. Drijber, Legal protection of enterprises: administrative procedure, in particular access to files and confidentiality, 1996, 7 ECLR.

Consequently, the institution of the HO guaranteed more objectivity in the procedure without facing drawbacks coming from alternative solutions. The European Commission instituted the structure of the HO, fixing, contextually, his competences, even though limited at that time at the preparation, direction and follow up of the oral hearings in antitrust procedures[12].

Before the HO was created by the Commission, oral hearings were presided by the director responsible of DG IV. After several informal amendments[13], by decision 810/1994/EC the European Commission extended the role of the HO both to concentrations and to the entire administrative procedure without the previous limitation to the oral hearings[14]. In particular, his functions concerned the decision on the requests for extension of time limits to reply to the SO, decisions both on access to file and confidentiality, the organization of the oral hearings with following reports to the Commissioner.

The last Commission decision 462/2001/EC reinforces even more the HO's role, giving the power to present observations to the Commissioner on any matters (even substantial) arising out of competition proceedings[15]. Such a power is strictly connected with another new provision related to the duty of the director responsible to inform the HO "about the development of the procedure up to the stage of the draft decision to be submitted to the competent member of the Commission" [16]. These new provisions raise the importance of the HO, by considering the latter an advisor of the Commissioner during all the procedure; such powers in addition to others already existing allow the HO to alert the Commissioner at any time, given its perfect information of the case even at a stage it is not involved anymore in the proceedings.

First of all, peculiarities characterizing the figure of the HO are analysed. In this sense, transparency is the first step towards its independence, that is necessary in order to guarantee the objectivity of competition proceedings dealt with by the European Commission; the objectivity emerges from the correct exercise of the right to be heard, whose safeguard depends on the HO.

The objectivity increases in proportion to the independence of the figure analysed. Under the latter point of view the evolution is surely positive, considering that while *ex* art. 1 (3) of the previous Commission decision the HO belonged to DG competition with the right of direct access to the Commissioner, now the HO is directly attached to the Cabinet of the Commissioner[17].

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[12] EC Commission XII Report on competition policy (Commission 1982), 36, 37.

[13] EC Commission XIII Report on competition policy (Commission 1983), 76; EC Commission XVIII Report on competition policy (Commission 1988), 44; EC Commission XX Report on competition policy (Commission 1990), 312, 314, where it was stated that oral hearings would be organised in transport cases as well.

[14] Commission decision 94/810/EC of 12/12/1994 on the terms of reference of hearing officers in certain competition proceedings. In relation to this decision M. Van Der Woude, Hearing officers and EC antitrust procedures; the art of making subjective procedures more objective, 1996, 33 CMLR, 531.

[15] E*x* art. 3 (3) of the decision 462/2001/EC revoking, *ex* art.17, the previous decision 94/810/EC.

[16] Art. 3 (2) of the decision 462/2001/EC.

[17] See art. 2 (2) of the decision 462/2001/EC.

In order to safeguard the right to be heard, the Commission sets out in whereas n.3 of the decision 462/2001/EC that administrative proceedings should be entrusted to "an independent person experienced in competition matters, who has the integrity necessary to contribute to the objectivity, transparency and efficiency of those proceedings"[18].

In case the HO is unable to act, the Commissioner shall designate as HO another official who is not involved in the competition case[19]; however, the previous hypothesis is difficult to happen in practice, given that there are currently two hearing officers.

For assuring even more the independence of the HO, art. 2 (1) of decision 462/2001/EC strengthens transparency: both the appointment of the HO and reasoned decisions of the European Commission concerning interruptions, terminations of appointment or transfers shall be published in the Official Journal.

Following transparency a final written report of the HO on the respect of the right to be heard (the so called final report) "shall be attached to the draft decision submitted to the Commission" *ex* art. 16 (1) of decision 462/2001/EC[20]; for the same reason, the final report, *ex* art. 16 (3), shall also be published in the Official Journal together with the decision, safeguarding, at the same time, legitimate interests of undertakings in the protection of their business secrets.

Moreover, "the final report shall be submitted to the competent member of the European Commission, the Director General for competition and the director responsible"[21]; in addition, it shall be communicated both to competent authorities of the Member States (besides to the EFTA Surveillance Authority in accordance with the EEA agreement) and, together with the decision, to the addressee of the latter[22].

It is difficult to imagine a negative final report of the HO attached to a Commission decision, stating an infringement of the right to be heard during the procedure; consequently, for avoiding future judicial problems, procedural shortcomings have to be corrected before attaching the final report to the draft decision.

Where appropriate (in particular with reference to the selection of respondents and the methodology used), the final report evaluates the objectivity of the enquiry referred to in art. 14 of decision

[18] Whereas n. 7 holds that it is possible to appoint as a HO candidates who are not officials of the Commission.

[19] Art. 2 (3) of the decision 462/2001/EC.

[20] At the contrary, in the old decision only the Commissioner after a request of the HO could decide to attach the final report to the draft decision.

[21] Art. 15 (2) of the decision 462/2001/EC differently from the previous one which stated that the HO had to report only to the director general.

[22] Respectively artt. 15 and 16 (3) of the decision 462/2001/EC. It is also useful to remind that the EFTA Surveillance Authority issued the 30th of October 2002 a decision on the term of reference of hearing officers in certain competition proceedings.

462/2001/EC (the so called market tests), assessing the competition impact of commitments proposed; such commitments are, if necessary, modified on the basis of market test results[23].

In order to guarantee the objectivity of the enquiry, it is necessary that the questionnaire used (and the attachments) provides a full knowledge of the commitments proposed to the third-parties[24]; in this way, their right to be heard is fully safeguarded[25].

In case an enquiry is carried out by the Commission[26], responses must be accessible to the notifying parties in non-confidential versions (anonymous or not)[27]. Despite the short deadlines, the Commission is still obliged to justify its refusal to allow access to the responses to the market test; the latter obligation applies even more strongly to the responses submitted without any request for confidentiality[28].

In some cases, the Commission may draft non-confidential summaries (anonymous or not)[29]; however, it is necessary to guarantee the objectivity of the summary of the replies provided by the Commission to parties. In case the latter doubt this objectivity, it is possible to request a control to the HO asking the Commission, if necessary, the integration of the original summary[30].

Ex art. 5 of decision 462/2001/EC, the HO contributes to the objectivity both of the hearing and of any decision taken subsequently[31]. As regards the objectivity of the oral hearing, the HO requests to the director responsible all the justifications provided by parties to the objections made by DG competition as well as their replies[32].

For a better clarification of questions of fact, art. 11 of decision 462/2001/EC states that the HO may supply in advance to the parties invited to the oral hearing a list of questions; for the same purpose, the HO may hold a meeting with the parties invited to the hearing, and ask for prior written notification of the essential contents of the intended statement.

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[23] In the selection of the respondents, Final Report of the Hearing Officer in case COMP/M.2220 – GE/Honeywell, holds that objectivity comes from a non-discriminatory choice of the respondents among competitors and customers who not only have participated to the proceedings, but have also an adequate knowledge of the sector suitable to provide relevant information to the Commission.

[24] In this sense, Final Report of the Hearing Officer in case COMP/M.2416 – Tetra Laval/Sidel, where, even though the description of the commitments in the questionnaire could certainly be more accurate, attaching to the questionnaire all the commitments safeguarded the objectivity of the investigation. From Final Report of the Hearing Officer in case COMP/M.2978 – Lagardere/Natexis/VUP, emerges that in the questionnaire sent to third-parties was attached a non-confidential version of the commitments.

[25] T 290/94, Kaysersberg / Commission, [1997] ECR II-2137, 119-121.

[26] Final Report of the Hearing Officer in case COMP/M.2416 – Tetra Laval/Sidel, established that the Commission is not obliged to carry out an enquiry.

[27] Final Report of the Hearing Officer in case COMP/M.2416 – Tetra Laval/Sidel; Final Report of the Hearing Officer in case COMP/M.2978 – Lagardere/Natexis/VUP; Final Report of the Hearing Officer in case COMP/M.2416 – Bayer/Aventis Crop Science.

[28] T 5/02, Tetra Laval / Commission, [2002] ECR II 4381, 105-106.

[29] T 5/02, Tetra Laval / Commission, [2002] ECR II 4381.

[30] Final Report of the Hearing Officer in case COMP/M.2416 – Tetra Laval/Sidel.

[31] In this sense art. 12 (2) of the decision 462/2001/EC. *Ex* art. 12 comma 1 the HO shall determine the data, the duration and the place of the hearing, deciding, at the same time, whether to allow postponements.

[32] See EC Commission XXXIII Report on competition policy (Commission 2003).

Besides, in addition to the observations during all the procedure *ex* art. 3 (3) of decision 462/2001/EC, after the oral hearing the HO may submit to the Commissioner observations on the progress of the procedure, highlighting, among other things, the need for further information, the withdrawal of certain objections or the formulation of further objections[33].

These powers allow the HO to guarantee that all the relevant facts (favourable or not to the parties concerned) are objectively considered in the draft Commission decisions[34].

The HO's opinion represents another fresh pair of eyes in the system of the Commission's checks and balances: the reference is to the inter services consultations (legal service), the Chief Economist, the Advisory Committee and the scrutiny panels[35].

PARAGRAPH 2: The right to be heard: a general principle of the Union's law

European Union courts have a wide discretion in order to identify general principles of the Union's law. Such category should not be openly in contrast with the Member States' national systems.

With reference to the protection of fundamental rights[36], general principles are inspired by constitutional traditions commons to the Member States[37]; anyway, the Court of Justice's (here in after the CJ) wide discretionary power arises from the possibility to identify a general principle even with reference to a single national system[38].

Alternately, general principles are also identified by means of the international instruments related to the safeguard of human rights, in particular the European Convention for the protection of human rights and fundamental freedoms (here in after the ECHR).

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[33] Such observations are considered by art. 13 (2) of the decision 462/2001/EC in addition to the so called interim report.

[34] See art. 5 of the decision 462/2001/EC which refers also to the oral hearing.
See, also, Final Report of the Hearing Officer in case COMP/M.2220 – GE/Honeywell.

[35] Albers & Williams, Oral hearings-Neither a trial nor a state of play meeting, considers that the oral hearing functions as a check and balance within the administrative procedure. Besides, the Chief Competition Economist assisted by a specialised team provides guidance in individual cases, by reporting to the Director General and presenting its conclusion to the Commissioner. At the same way, the peer review panel composed by experienced officials checks conclusions drawn up by the case team before the SO, by reporting to the Director General and presenting its conclusion to the Commissioner.

[36] The right to be heard has been held to be part of the fundamental rights jurisprudence: C 49/88 Al-Jubail Fertilizer v Council [1991]ECR I-3187, 15; T 33-34/98 Petrotub and Repubblica SA v Council [1999]ECR II-3837; C 458/98 P Industrie des Poudres Spheriques v Council and Commission [2000]ECR I-8147, 99.

[37] In C 155/79, AM & S, [1982] ECR 1575, Advocate General Slynn held that a comparative study of the legal systems of the Member States is useful to discover general principles of Community law.

[38] Gaja, Diritto dell'Unione Europea, 2005, holds that the CJ is normally inspired by certain national systems (in particular the German one) rather than identifying a principle common to all the systems. C 155/79, AM & S, [1982] ECR 1575, identified a general principle with reference to the legal privilege in the English tradition.

Final condition is the compatibility of the general principle with the objectives and principles of the European Union system.

As regards the right to be heard, the Treaty on the functioning of the European Union (here in after the TFEU) does not consider it in competition proceedings[39]; anyway, both art. 27 regulation No1/2003 and art. 18 regulation No139/2004 (besides the respective implementing regulations) specify it.

The right to be heard is a general principle of the Union's law as stated for the first time by European courts in 1974[40]. On the basis of art. 19 TEU "the Court of Justice of the European Union…shall ensure that in the interpretation and application of the Treaties the law is observed". After examining all the different national legal systems of the Member States, the right to be heard has been considered a general principle making part of "the law" to which art. 19 refers to.

Accordingly, the CJ set out that "a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known" [41].

Considered that the right to be heard is a general principle of the Union's law, it should be guaranteed even in the absence of a procedural rule[42]. Moreover, given the value of the general principles, these must be taken into account even when the existing legislation does not apply them[43].

It seems the case to specify that administrative proceedings liable to culminate in a measure adversely affecting a person does not necessarily mean that the proceedings lead to a fine; a procedure may adversely affect a person even without considering any fine, as it was confirmed by the current General Court (here in after the GC) in a case regarding a Commission decision ordering repayment[44]. The latter conclusion is also clear from the merger field where the incompatibility decision toward parties does not involve any fine.

The criterion in order to establish if a measure adversely affects a person is given by the economic consequences of the Commission decision, even in case proceedings are initiated against another person; when the Commission decision had been addressed to the Member State, the applicant

[39] Only art. 108 (2) TFEU in the state aid field considers it, by stating "after giving notice to the parties concerned to submit their comments".

[40] C 17/74, Transocean Marine Paint Association / Commission, [1974] ECR 1063.

[41] C 17/74, Transocean Marine Paint Association / Commission [1974] ECR 1063, 15. The right to be heard was first considered into disciplinary proceedings, by extending it later to proceedings leading to sanctions: C 56 and 58/64, Consten and Grundig/ Commission, [1966] ECR 299, 338; C 85/76 Hoffmann-La Roche/ Commission [1979] ECR 461, 9.

[42] C – 68/94 e 30/95, France & SCPA/Commission [1998] ECR I – 1375; C-32/95, Commission/ Lisrestal and Others, [1996] ECR I-5373, 21.

[43] T 260/94, Air Inter/Commission, [1997] ECR II 997, 60.

[44] T 450/93, Lisrestal and Others/ Commission, [1994] ECR II 1177.

undertakings were directly and individually concerned *ex* art. 263 (4) TFEU by the repayment ordered without being the addressees of the decision[45].

The right to be heard should apply also to the beneficiaries of the assistance, otherwise it leads to the nullity of the decision. The fact that a right to be heard has been granted to the Member State does not mean that the applicants' rights have adequately been protected through the Member State; consequently, the European Commission must specifically safeguard their right of defence without supposing that the Member State might do it[46].

During the appeal the Commission tried to justify the violation, by stating that the consultation of the beneficiaries of the European Social Fund following the right to be heard placed a heavy administrative burden; however, the CJ stated that an argument based on practical difficulties is not sufficient to justify the infringement of the right to be heard[47].

At the contrary, another judgement held that the right to be heard had not been violated, given that hundreds of applications characterised the procedure[48]. The latter judgement should be seen in connection with the fact that the Commission is required to adopt a decision within a reasonable time[49].

Certainly, the right to be heard is not going to be applied in relation to the European Union legislation; it is clear the point of view of the European courts, stating that "contrary to the applicants' argument, the right to be heard in an administrative procedure affecting a specific person cannot be transposed to the context of a legislative process leading to the adoption of general laws". Consequently, "in the context of a procedure for the adoption of a Community act based on an article of the Treaty, the only obligations of consultation incumbent on the Community legislature are those laid down in the article in question" [50].

Anyway, on the basis of art. 263 TFEU "any natural or legal person may…institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former". The latter article has been interpreted by the European Union courts in an extensive way.

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[45] T 450/93, Lisrestal and Others/ Commission , cit., 42-48.

[46] It comes out from C 48/90 and C 66/90, Netherlands and PTT/Commission [1992] ECR I-565, where a Commission decision under article 106 has been declared void after the state undertaking's appeal. At the contrary, T 260/94, Air Inter/Commission, [1997] ECR II-997, 65, held that it was sufficient if the right to be heard was indirectly respected through the national authorities.

[47] C 32/95, Commission/Lisrestal and Others, cit., 35-37; also C 66/90, Netherlands and PTT / Commission [1992] ECR I-565, 50; T 42/96, Eyckeler & Malt /Commission [1998] ECR II-401, 76.

[48] T 109/94, Windpark Groothusen / Commission, [1995] ECR II-3007.

[49] T 213/95, and T 18/96, SCK and FNK / Commission, [1997] ECR II-1739, 56; T 26/99, Trabisco SA / Commission, [2001] ECR II-633, held that even if the time was not reasonable, the annulment of the decision in its entirety would have been justified only if the delay had adversely affected the defence of the company (and then the outcome of the proceedings).

[50] T 521/93, Atlanta AG, [1996] ECR II-70 71.

On the one hand, the term "another person" involves also the Member States as addresses of the decisions[51]; on the other hand, even a decision issued in the form of a directive may be challenged[52]. It means that the infringement of the right to be heard may be safeguarded even when the European Union legislation has substantially an administrative nature.

If the criterion to establish that a measure adversely affects a person is represented by the economic consequences of the Commission decision as stated by the judgements analysed, it seems sensible to foresee a full application of the right to be heard both to the complainants and third parties; after showing respectively a legitimate interest and a sufficient interest, the general principle of European Union law should prevail on the regulations limiting their position with reference to the right to be heard.

Being directly and individually concerned *ex* art. 263 (4) TFEU by the economic consequences of the Commission decisions implies also the possibility to institute proceedings; following the violation of the right to be heard, *ex* art. 263 (2) TFEU an action may be brought for "infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application". The term "law" refers to the general principles of the Union's law; it means that general principles are one of the parameters used to review the legality of European Union acts[53].

Moreover, *ex* art. 19 TEU "the Court of Justice of the European Union…shall ensure that in the interpretation and application of the Treaties the law is observed"; consequently, general principles are also used both to interpreter and to integrate European Union law.

It is not clear if general principles may fill any gap existing in the Treaty[54]; the answer might be negative because of the fact that general principles of the Union's law are considered in the middle between primary law (Treaties) and secondary law (acts of the institutions)[55].

That is why the right to be heard as a general principle has been guaranteed by the European Union judges only in the absence of a procedural rule inside secondary law and when the latter does not apply it[56] [57]. Anyway, both whereas 37 regulation No1/2003 and 36 regulation No139/2004 state that fundamental rights and the principles recognised in particular by the Charter of fundamental rights of the European Union are respected; consequently, "this regulation should be interpreted and applied with respect to those rights and principles".

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[51] C 106 and 107/63, Topfer, [1965] ECR 497.

[52] Order of the GC, T 99/94, Asocarne, [1994] ECR II 871; Order of the CJ, C 10/95, Asocarne, [1995] ECR I-4149.

[53] C 291/89, Interhotel v Commission, [1991]ECR I-2257, 14; C 367/95 P Commission v Sytraval and Brink's France [1998]ECR I-1719, 67, state that observance of the right to be heard can be raised by the Court of its own motion.

[54] F. Pocar, Diritto dell'Unione e delle comunità europee, 2004, considers such a possibility not feasible except when the Treaty expressly refers to the general principles as in art.340 (2) with reference to the non contractual liability.

[55] Gaja, Diritto dell'Unione europea, 2005.

[56] C – 68/94 e 30/95, France & SCPA / Commission (1998) ECR I – 1375; C-32/95 P Commission / Lisrestal and Others [1996] ECR I-5373, 21.

[57] T 260/94, Air Inter / Commission, cit., 60.

After the Lisbon Treaty art. 6 (3) TEU sets out that "fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

It is possible to conclude that the legal value of the fundamental rights as general principles of the Union's law has been raised at the level of primary law[58]; consequently, it seems sensible to declare that the right to be heard may fill any gap existing in the Treaty or be interpreted prevailing on the rules of the Treaty in contrast with them.

Article 6 (1) of the ECHR states that "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal...".

The ECHR does not have a legal status inside the European Union, given that the latter has not signed the Convention[59].

Anyway, all the Member States are signatories of the ECHR drawn up under the aegis of the Council of Europe in 1950. The European Commission of human rights recalled that art. 1 ECHR states that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section I of this Convention"; consequently, it is in contrast with such a rule if a national judge executes a European Union judgement in violation with the ECHR[60].

Besides, given that art. 351 TFEU states that "the rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, …shall not be affected by the provisions of the Treaties", ECHR may be applicable when national authorities or courts apply art. 101 and 102 TFEU under regulation No1/2003.

Anyway, after the Lisbon treaty, art. 6 (2) TEU states that "the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties"[61].

As regards the Charter of fundamental rights of the European Union of 7 December 2000, adapted at Strasbourg on 12 December 2007 by the European Parliament, the Council and the Commission,

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[58] Gaja, Diritto dell'Unione europea, 2005.

[59] With reference to the previous TEU, T 112/98, Mannesmannrorhen Werke AG / Commission, [2001] ECR II-729, 59 – 60 and 77, stated that it does not lead to adopt the system without signing it on the basis of international law, but it certainly forces the Commission to give a "protection equivalent to that guaranteed by article 6 of the Convention". The European Commission of human rights, M & Co / The federal Republic of Germany, YECHR, 1990, 46, stated that it was not competent in relation to EC decisions, given that the latter does not take part to the ECHR.

[60] Matthews / United Kingdom, YECHR, 1999.

[61] For the compatibility of EU competition proceedings I. Forrester, Due process in EC competition cases: a distinguished institution with flawed procedures, ELR, 2009, 817, states that "the matter will be all the more pressing when the European Union accedes to the ECHR, as is foreseen by the Lisbon Treaty".

by virtue of art. 6 (1) TEU has the same legal value as the Treaties without being incorporated in the Lisbon Treaty[62].

With reference to the right to be heard, whereas n. 2 of the decision 462/2001/EC states that the Commission must ensure that such a right is guaranteed "having regard, in particular, to the Charter of Fundamental Rights of European Union".

On this subject, art. 41 of the Charter (right to good administration) states that "every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union".

The latter contains "the right of every person to be heard, before any individual measure which would affect him or her adversely is taken, the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy and the obligation of the administration to give reasons for its decisions".

In the previous Commission decision the right of defence was considered the object of the HO's control; in this field the Commission delegated the power to take decisions to the Commissioner who in his turn delegated to the HO[63].

At the opposite, now art. 1 of the decision 462/2001/EC states that "the Commission shall appoint one or more hearing officers, who shall ensure the effective exercise of the right to be heard in competition proceedings..." [64].

The right to be heard has a double dimension. A first dimension considers both the SO and the right to access to file necessary for a correct knowledge of the objections; a second dimension considers both replies to the SO and oral hearings through which different points of view are communicated.

Statement of Objections

According to the Union's case law the right to be heard obliges first of all the Commission to state the objections to the parties[65].

The SO is "intended solely for the undertakings against which the procedure is initiated with a view to enabling them to exercise effectively their right to a fair hearing" [66].

[62] For more information see P. Craig, EU administrative law. The acquis?, in Riv. it. dir. pubblic. comunit., 2011, 02, 329.

[63] EC Commission XXIII Report on competition policy (Commission 1993), 203.

[64] At the moment two hearing officers have been appointed by the Commission.

[65] C 17/74, Transocean Marine Paint Association/Commission [1974] ECR 1063.

[66] Order of the President of the CJ, C 142 and 156/84, BAT and Reynolds Industries / Commission, [1987] ECR 4487, 14; T 348/94, Enso Espanola / Commission, [1998] ECR II-1875, 83.

An additional function of the SO is to allow notifying parties the chance to suggest corrective measures in order to provide a solution to the competition problems identified by the Commission[67]; the judgement may be extended to the commitments *ex* art. 9 regulation No1/2003.

Given that the SO should allow the party to prepare a defence against the finding of an infringement, a complete SO would consider both allegations of fact and law as well as references to evidence[68]. Moreover, the SO must specify parties who could potentially be addressee of the fines.

The Commission "shall base its decisions only on objections on which the parties concerned have been able to comment" [69]; consequently, the Commission cannot base its objections on confidential information which are not going to be disclosed to the parties[70]. It means that the right to confidentiality could hinder the public interest pursued by the Commission. The protection of information which are confidential obliges the Commission not to reveal such information; by not revealing them in the SO parties have not exercised their right to be heard, so that the Commission is not allowed to use the same information in the final decision.

When documents are not mentioned by the Commission in the SO, a party is entitled to consider them not valuable for the case[71]; an hypothetical use of the documents by the Commission in the final decision would prevent parties from exercising their right to be heard, by avoiding that they make known their views on the probative value of the documents.

The Commission is not obliged to explain any differences between its final assessment and the provisional assessment carried out in the SO[72]; anyway, the matter does not arise if the Commission changes its objections in favour of parties, given that the ratio of the right to be heard is to defend a company[73].

Besides, it is not sufficient for the undertaking concerned to point to the mere existence of differences between the SO and the contested decision without explaining precisely and specifically why a difference constitutes a new objection[74]; when such an obligation is not fulfilled, the

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[67] T 310/01, Schneider Electric / Commission, [2002] ECR II-4071, 442-444, annulled the Commission decision because of the fact that the SO did not allow the notifying parties to assess all the competition problems coming from the merger, by indirectly depriving them of the chance of obtaining the approval which the Commission might have given to the remedies proposed.

[68] C – 62/86 AKZO / Commission (1991) ECR I – 3359, 29; T – 352/94 Mooch Domsjo / Commission (1998) ECR II – 1989, 63. C 24/62, Germany / Commission, [1963] ECR 127, 140 in accordance to the ECHR case law with reference to art. 6 (3).

[69] Art. 27 (1) regulation No1/2003; at the same way art 11 (2) regulation No773/2004 while for mergers art.18 (3) regulation No139/2004. *Ex* art. 15 of the decision 462/2001/EC, the HO checks in the final report, in relation to all the objections of the draft decision, the respect of the right to be heard; it means first of all verifying that the objections were initially included in the SO.

[70] C. J. Cook, C. S. Kerse, EC merger control, 1995.

[71] C 107/82, AEG Telefunken / Commission, [1983] ECR 3151, 24-28.

[72] Order of the President of the CJ, in T 142and 156/84, BAT and Reynolds / Commission, [1989] ECR 1899, 15.

[73] C 103/80, Musique Diffusion / Commission, [1983] ECR 1825.

[74] T 228/97, Irish sugar/Commission , [1999] ECR II 2969, 33.

applicant's arguments must be rejected. Anyway, when a matter is discussed at the oral hearing without being previously considered in the SO, making known views in this context prevents from complaining later that the final decision does not coincide with the SO[75] .

Whether the Commission intends to use in the final decision new objections of fact or law different from those contained in the SO, it must notify a supplementary SO after modifying the nature of the objections[76]; it is a violation of the right of defence, "the sending, solely for the purposes of information, of a copy of a supplementary Statement of Objections which, …was addressed to another party, without any period of time being granted to the undertaking concerned in order to enable it to submit its observations" [77].

Access to file

While the right to be heard is a general principle of EU law, on the one hand art. 15 TFEU considers a right of access to documents of the Union's institutions following transparency, on the other hand art. 339 TFEU underlines professional secrecy and confidentiality of sensitive information.

Access to file is requested by the parties to the Commission; in particular, the request is expressly made to the team dealing with the case in DG Competition[78].

Based on previous negative answers made by the case team of the Commission to the requests of access, the HO answers by means of a reasoned decision to the new requests[79].

Ex art. 8 (1) of the decision 462/2001/EC, requests to the HO are based on the consciousness that the Commission owns documents potentially useful for the exercise of the right to be heard; under this point of view, the list of documents in the file shall include a summary enabling the content and

[75] T 100/80 and others, Musique Diffusion / Commission, [1983] ECR 2671, 18-19.

[76] T 39/92 and others, Groupement des cartes bancaires CB and Europay International SA / Commission, [1994] ECR II-49, considered that while the SO stated a price fixing agreement, in the supplementary SO the Commission modified the nature of the objection.

[77] T 39/92 and others, Groupement des cartes bancaires CB and Europay International SA / Commission, [1994] ECR II-49, stated that "it cannot be excluded that the procedure might have had a different result if the Commission had properly notified the supplementary Statement of Objections to the undertaking and if it had prescribed a period of time for that undertaking to submit its observations with respect to that Statement of Objections"; consequently, the infringement of the rights of the defence led to annul the Commission decision with reference to the said undertaking.

[78] With reference to the principle of equality of arms, T 30/97, Solvay SA v Commission [1995] ECR II 1775, 83, states that "the knowledge which the undertaking concerned has of the file used in the proceeding is the same as that of the Commission".

[79] Among others, Final Report of the Hearing Officer in case COMP/E 1/C.37.671 – Food Flavour Enhancers. T – 44/00, Mannesmannröhren-Werke / Commission, stating clearly that a party had requested the access to documents without, however, requesting the intervention of the HO following the Commission's refusal; failure to do so can be taken as acceptance of the Commission position.

the subject of the documents to be identified, so that any firm is able to evaluate the relevance to its defence and the opportunity of an access despite the classification as non accessible document[80].

A judicial action related to access to file is only possible at the end of the Commission's procedure in the context of the annulment of the final decision[81]. On the one hand, a contested decision refusing the applicant access to certain documents is not capable of producing legal effects of such a nature as to affect the applicant's interests immediately, before any final decision finding an infringement (and possibly imposing a penalty) is adopted[82]; on the other hand, a refusal to grant access does not irreversibly affect the legal situation of the undertaking, given the possibility that the Commission revises any procedural irregularities by subsequently granting access to the file[83].

Documents which are internal to the institution are inaccessible. The restriction is justified by the need to ensure the proper functioning of the institution concerned when dealing with infringements of the Treaty competition rules[84]; it allows the Commission's offices to express themselves freely within the institution[85].

Internal documents were theoretically inserted in the file of internal documents[86]; the classification is made under the control of the HO, certifying (where it is necessary) the nature of internal documents of the collected information[87].

As regards confidential information, the so called akzo procedure considers lawful a disclosure of potential business secrets when:

-an opportunity to submit written comments is granted by the Commission

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[80] In particular, paragraph 38 of the new Commission Notice states that "the non confidential versions and the descriptions of the deleted information must be established in a manner that enables any party with access to the file to determine whether the information deleted is likely to be relevant for its defence and therefore whether there are sufficient grounds to request the Commission to grant access to the information claimed to be confidential".

[81] C 60/81, IBM / Commission [1981] ECR 2639, 12, 24, stating that measures of a purely preparatory character may not themselves be the subject of an application for a declaration that they are void; any legal defects should be challenged by an action directed against the definitive act for which they represent a preparatory step. "It will then be for the court to decide whether anything unlawful has been done in the course of the administrative procedure and if so whether it is such as to affect the legality of the decision taken by the commission on the conclusion of the administrative procedure".

[82] T 216/01 R Reisenbank AG / Commission [2001] ECR II-3481, 51; T 10, 11, 12 and 15/92 R, Cimenteries CBR and Others / Commission [1992] ECR II-2667, 48.

[83] T 10, 11, 12 and 15/92 R, Cimenteries CBR / Commission, [1992] ECR II-2667, 47, where access was required to documents concerning the national markets of the alleged conspirators. At the same way T 216/01 R Reisenbank AG / Commission [2001] ECR II-3481, 46, where it is stated that, "until a final decision has been adopted, the Commission may, in view, in particular, of the written and oral observations of the applicant, abandon some or even all of the objections initially raised against it. It may also rectify any procedural irregularities by subsequently granting access to the file after initially declining to do so".

[84] T 191/98, Atlantic Container Line and Others / Commission [2003], ECR II-3275 , 394 ; T 25/95, Cimenteries CBR / Commission, [2000] ECR II-491, 420.

[85] T 191/98, T 212/98 and T 214/98, Atlantic container line / Commission [2003], ECR II-3275.

[86] In that way the previous Commission notice for access to the file, 1997, II. A. 2., according to which internal documents followed a chronological order; in practice, however, also internal documents were placed in the official file.

[87] According to T 50/00, Dalmine / Commission , the HO does not need to check in case the classification of some documents as internal documents is not in discussion; it is the party who must raise the question to the HO, who, consequently, carries out the control.

-a reasoned decision notified to the undertaking concerned is taken by the HO containing an adequate statement of the reasons

-before implementing its decision an opportunity to appeal is granted without waiting a Commission's final decision, given the serious damage which could come out from the access to business secrets[88].

After the case team has refused a request for protection of information made by the undertaking, in accordance with the akzo procedure the HO shall explain in writing its intention to disclose potential business secrets (informal letter), by fixing a time limit in order to allow the undertaking concerned to submit written comments[89].

Whether after analysing the written comments it is held that the information is not protected, the HO shall issue a reasoned decision notified to the undertaking concerned (article 9 letter), by specifying a date (not less than one week from the notification) for the disclosure[90].

Art. 9 of the Commission decision 462/2001/EC does not mention the possibility to bring an annulment action with a potential request for suspension; however, according to the akzo procedure, before implementing art. 9 letter an opportunity to appeal should be granted without waiting for the final decision[91]. Differently from other decisions of the HO which can be challenged with the final decision, article 9 letters can be challenged directly before the current GC *ex* art. 263 TFEU[92].

In order to try to avoid the so called akzo procedure (and legal disputes), a procedure was introduced before issuing article 9 letters; the HO may issue the so called pre article 9 letter, granting a deadline within which it can make known its views[93]. If the latter is contested within a certain period of time, a more restrictive binding decision will be issued by the HO (article 9 letter)[94].

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[88] C 53/85, Akzo Chemie / Commission [1986] ECR 1965, 29, 30, 31. In C 36/92, SEP / Commission [1994] ECR I-1911, the court extended the procedure in question to the transmission of secret documents to the national competition authorities.

[89] Art.9 (1) of the decision 462/2001/EC.

[90] Art.9 (2) of the decision 462/2001/EC. *Ex* art.9 (3) the same procedure is applied to the disclosure of information through publication in the Official Journal; the latter paragraph is a novelty in comparison with the previous Commission decision.

[91] C 53/85, Akzo Chemie / Commission [1986] ECR 1965, 29, 30, 31.

[92] C 53/85, Akzo Chemie / Commission [1986] ECR 1965, 20, by stating that the decision is definitive in nature and independent of the final decision. The hearing office, Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU (*ex* articles 81 and 82 EC), 24, states that in case of request of interim measures, "the disputed information will not be disclosed until the President of the General Court has issued an order ruling on the application for interim measures".

[93] The hearing office, Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU (*ex* articles 81 and 82 EC), 22.

[94] EC Commission XXXIV Report on competition policy (Commission 2004), 11.

On the one hand the HO may consider a document non confidential[95], on the other hand after determining that the information is confidential *per se*, the HO "carry out a balancing test" between right to confidentiality and right of defence[96]. Under the latter point of view, after highlighting that only information made accessible to parties may be considered in the final decision, EC Commission XXXIII Report on competition policy held that the implementation of competition law may be obstructed by confidentiality; that is why in the balancing carried out by the HO, the public interest to end competition infringements has an important value.

When business secrets represent inculpatory or exculpatory evidence, the Commission reconciles confidential information, the public interest to end competition infringements and the right of defence[97]. In practical terms, the Commission assesses all the relevant elements in order to understand for each document whether the benefit coming from the disclosure is greater than the harm[98].

In particular, in relation to the right of defence, the reference is to the probative value as well as the indispensability of the information, while in relation to the right of confidentiality, the reference is to the degree of sensitivity of the information. Finally, as regards the public interest, the reference is to the seriousness of the infringement[99].

While the previous Commission Notice on access to file did not explain what the file was, paragraph 8 of the new Notice defines it as "all documents, which have been obtained, produced and/or assembled by the Commission Directorate General for Competition, during the investigation" [100].

When documents "prove to be unrelated to the subject matter of the case in question", the Commission may return documents to the undertakings[101]. However, documents which are unrelated under the point of view of the prosecutorial Commission may constitute an exculpatory evidence for the defendant.

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[95] Final Report of the Hearing Officer in case COMP/36.571 – Austrian Banks, states that the HO refused to cancel the names of the parties (the banks) from the non confidential version of the SO used for the access of the complainant, given that they did not represent business secrets.

[96] The hearing office, Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU (*ex* articles 81 and 82 EC), 22.

[97] In that way the previous Commission Notice for access to the file, 1997, I. A. 1.

[98] In that way the previous Commission Notice for access to the file, 1997, I. A. 1.

[99] Commission Notice for access to the file, 24. Final Report of the Hearing Officer in case COMP/36.571 – Austrian Banks, refers to an action against an art.9 letter issued by the HO which authorised the access to the non confidential version of the SO; the GC held that the community interest coming from the observations provided by the complainants prevailed on the interests of the banks.

[100] Paragraph 33 of the Commission Notice on immunity from fines and reduction of fines in cartel cases (Leniency Notice) states that "any written statement made via à vis the Commission in relation to this Notice forms part of the Commission file".

[101] Commission Notice for access to the file, 9, stating the same concept of part II A 1.1 of the previous one.

Even though the final decision proposed by the Commissioner responsible for competition is a collective decision, the Commission file is composed only of documents collected by DG Competition[102]; in relation to this point, when it is important in order to exercise the right to be heard, access should be guaranteed to any document inside the Commission independently from the DG[103].

It is not only from investigation that DG competition receives documents relating to the anticompetitive objections raised in the administrative proceedings; in case of replies to the SO, documents are received in the context of the exercise of the right to be heard.

Ex paragraph 27 of the Commission Notice for access to the file, access in antitrust cases is limited to a single occasion rather than being continuous; consequently, as general rule access to the replies to the SO is not allowed. The exception refers to "new evidence pertaining to the allegations against that party in the Commission's statement of objections". However, access to file refers not only to inculpatory evidence but also to exculpatory evidence; that is why after the public consultation in the latter version of the Notice it was added "whether of an incriminating or of an exculpatory nature".

An access at later stages of the administrative procedure will be granted, "where the Commission intends to rely on new evidence". Of course, a prosecutorial Commission will never decide to rely on new exculpatory evidence; however, the new exculpatory evidence has to be revealed anyway, even if the Commission does not intend to rely on it[104].

Even if European Union courts mostly speak about the right to access to file extending to all the documents in the investigation file, it appears that the Commission can not refuse access to documents outside the file in case they are relevant for the right to be heard; with reference to the exculpatory documents, the party must make an express request to the Commission for access[105]. It comes out from a sector enquiry undertaken by the Commission on the basis of art. 17 regulation No1/2003, when documents have been kept separately from the file.

At the same way, the Commission is not allowed to refuse access to documents inserted in the file of a different but connected case, when it is supposed to safeguard the party's right of defence. The Court held that documents concerning art. 102 could have been useful to defend a party against art. 101; in particular, "those documents might have shown that the passive conduct alleged against

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[102] A criticism is expressed by M. Levitt, Commission Notice on internal rules of procedure for access to the file, 1997 3 ECLR.

[103] In Steel Beams, O.J. L116/1 1994 5 CMLR 353, the HO required a research in the DG industry's file.

[104] T 191/98, Atlantic Container Line and Others / Commission [2003], ECR II-3275, 340; T 25/95, Cimenteries CBR / Commission [2000] ECR II-491, 383. It also refers to documents outside the investigation file.

[105] T 25/95, Cimenteries CBR / Commission [2000] ECR II-491, 383.

Solvay was based on its own independent decisions, motivated by the difficulty of penetrating a market, access to which was blocked by an undertaking in a dominant position" [106].

Anyway, during the procedure the Commission is not supposed to make available of its own initiative documents outside the file not used against the parties in the final decision[107]. The conclusion drawn by the GC with reference to the exculpatory documents seems to be in contrast with the right to be heard, given that it would make its exercise too difficult in practice; under this point of view, it should be underlined that undertakings have to identify documents as clearly as possible, so that speculative claims that there must be a helpful document somewhere may be rejected as insufficiently precise. Therefore, in order to allow specific requests for exculpatory documents outside the file, the Commission should make available them of its own initiative.

Replies to the Statement of Objections

The right to be heard is both in writing and orally.

Art. 10 (2) regulation No 773/2004 states that parties may inform the Commission in writing of their views; at the same way art. 13 (2) regulation No 802/2004 in relation to notifying parties. In both cases it clearly seems that undertakings are not obliged to reply to the SO.

In the SO the Commission shall set a date by which the parties may make known their views; art.10 (2) regulation No 773/2004 as well as art. 13 (2) regulation No 802/2004 state that the Commission will not be obliged to take into account written comments delivered after the date established by the Commission[108].

In setting the time limits the Commission shall have regard to the time required for the preparation of statements and the urgency of the case[109].

As regards the starting point for time limits, antitrust cases refer to the receipt of the access to file given their right to receive a copy of the file in an electronic (scanned) form; such a solution

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[106] T 25/95, Cimenteries CBR / Commission [2000] ECR II-491, 245.

[107] T 25/95 and others, Cimenteries CBR / Commission, [2000] ECR II-491, 383, where the court states that an express request to the Commission is necessary during the administrative proceedings; otherwise, the party cannot bring an action for annulment against the final decision.

[108] In Final Report of the hearing officer in case COMP/M.2416 – Tetra Laval/Sidel, after refusing the extension of the time limit, the HO stated that a supplementary document would be accepted for a short period after the expiry.

[109] In this sense both art. 17 (1) regulation No 773/2004 (setting out, at comma 2, at least four weeks) and art. 22 regulation No 802/2004. Final Report of the hearing officer in case COMP/M.2876 – Newscorp Telepiù, points out the in most merger cases parties own two weeks in order to reply to the SO, including also complicated cases or cases whose aspects are not known by parties in advance. Nevertheless it is however possible to reduce the 2 weeks time limit according to "the need of speed which characterises the general scheme of Regulation (EC) No 4064/89", recalling, in this sense, T 310/01, Schneider Electric / Commission [2002] ECR II-4071; T 221/95 , Endemol / Commission [1999] ECR II-1299.

complies with the right of defence, considered that a party can reply to the SO with a more complete knowledge of the case[110].

Given that an annex to the SO with some documents is provided by the Commission in paper or electronic form (CD ROM), letters to which the SO is normally attached can also consider the date of receipt of the letter as a starting point; when all the most important documents in the file are annexed to the SO, parties are immediately able to analyse documents in order to prepare their defence so that the starting date to be taken into account is the notification of the SO[111].

Before the expiry of the original time limit, it is possible to seek to the HO an extension of the time limit[112]; the HO shall inform in writing the applicant whether the request has been granted[113].

In the extension of the time limits, the HO normally considers, *inter alia*, both any obstacles caused by the Commission faced by the addressee (e. g. problems concerning access to file) and any other objective obstacle[114].

Oral Hearing

The right to be heard may be exercised also orally through the oral hearing which is not public[115].

The importance of this expression of the right of defence comes out from the fact that several times the direction taken in the SO has been objectified by the Commission after the hearing[116]; it explains, consequently, why many undertakings exploit their right of defence through the request to be heard in the oral hearing[117].

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[110] The hearing office, Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU (*ex* articles 81 and 82 EC), 27, states that "deadlines will normally start running when access to the main documents in the file has been granted".

[111] T – 44/00, Mannesmannrohren – Werke AG / Commission, 65. Even Final Report of the hearing officer in case COMP/C – 1/37.451, 35.578, 35.579 – Deutsche Telekom, admitted that a two months time limit was provided from the date of notification of the SO.

[112] In this sense *ex* art. 17 (4) regulation No 773/2004 is necessary a reasoned request.

[113] Art. 10 of the decision 462/2001/EC.

[114] The hearing office, Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU (*ex* articles 81 and 82 EC), 26.

[115] In this sense both art. 14 (6) regulation No 773/2004 and art. 15 (6) regulation No 802/2004.

[116] Final Report of the Hearing Officer in case COMP/37.978 – Methylglucamine, points out that in following both the replies to the SO and the result of the oral hearing, DG competition considered the violation ended in a period before that foreseen in the objection inside the SO; the reduction of the length of the violation implied positive consequences in the calculation of the fine. Final Report of the Hearing Officer in case COMP/37.685 – GVG/FS, points out that after the oral hearing one of the objections felt. Final Report of the Hearing Officer in case COMP/37.519 – Methionine, sets out that following the oral hearing the Commission did not continue the proceedings against two of the five producers involved.

[117] In this sense EC Commission XXXIII Report on competition policy (Commission 2003), 203. Albers & Williams, Oral hearings-Neither a trial nor a state of play meeting, states that "oral hearings are requested in around 75 percent of all cases for which a statement of objections has been issued".

While the Commission "shall" give the parties (in merger proceedings both notifying parties and other involved parties) the opportunity to participate in the oral hearing after requesting it in their replies, other persons "may" just be invited following their requests[118]. Anyway, the right to be heard is not an obligation; it is consequently possible both for parties and other involved parties to waive their right.

Even if in such a case it would be not possible to hold a formal oral hearing, an informal one may still be held by the Commission in order to test its position[119]. On the one hand case law does not preclude such a conclusion; on the other hand, it may be based on art. 15 (1) of Regulation No 1/2003 which speaks about "formal oral hearings", giving the impression that there could be informal ones as it normally happens in merger proceedings.

Hearing officers chair the meeting in full independence[120]. On the one hand each party is obliged to send a corporate representative or member of staff and not only an outside legal counsel[121], on the other hand there is certainly the case team of DG competition, but also the legal service, a representative of the Chief Economist, other involved Commission services and sometimes a Deputy Director General of DG competition, a member of the Cabinet of the Competition Commissioner and some of the national competition authorities.

Presentations will be given by the Commission, addressees of the SO and third parties supported by facts and evidence including witness and expert testimony; anyway, "new documents may not be submitted at the oral hearing without the prior authorization of the Hearing Officer"[122].

After duly motivated request explaining the need to protect business secrets and other confidential information, the HO may permit presentations of addressees and third parties in a closed *in camera* session; of course, the *in camera* session will be recorded separately from the oral hearing[123].

In order to improve the effectiveness of the oral hearings, the HO may allow parties, any other person invited, national authorities and Commission services to ask questions (the so called question and answer session)[124]; however, in case the HO allows it, it does not mean that they are obliged to ask questions[125].

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[118] Artt. 12 and 13 (2) and (3) regulation No 773/2004 and art. 14 (1) and (2) and art. 16 (2) and (3) regulation No 802/2004.

[119] Such a hearing would be seen outside the right of defence.

[120] Art. 14 regulation No 773/2004.

[121] Art. 14 (4) regulation No 773/2004 and art. 15 (4) regulation No 802/2004.

[122] See The hearing office, Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU (*ex* articles 81 and 82 EC), 45 ss.

[123] See The hearing office, Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU (*ex* articles 81 and 82 EC), 53 ss.

[124] Both art. 14 (7) regulation No 773/2004 and art. 15 (7) regulation No 802/2004. Whereas 12 regulation 773/2004.

[125] Opinion of the Advocate General Roemer, C 6/72, Europembellage Corp and Continental Can Co Inc / Commission, [1973] ECR 215.

At the same way, even if in practice it could be unavoidable, parties are in theory not obliged to answer to questions; the exercise of the parties' right to be heard through the oral hearing does not imply to be cross examined.

If a question for any reasons cannot be properly answered, parties may request to delay their answers after the oral hearing; in fact, in order to ensure the right to be heard, the HO may afford parties "the opportunity of submitting further written comments after the oral hearing" [126] which will be in principle distributed to all participants[127].

Ex art. 13 (1) of the decision 462/2001/EC the HO issues a report (*interim* report) to the competent member of the Commission concerning in theory procedural issues (disclosure of documents, access to the file, time limits for replying to the SO and the proper conduct of the oral hearing)[128].

In practice, the *interim* report is divided in four parts[129]. The first one is on the conduct of the oral hearing. The second one deals with procedural issues. The third part refers to the different positions held in the case (Commission, parties, third parties). The last one describes the HO's assessment of the case with its conclusions, by including both the procedure and the substance.

It should be emphasized that the *interim* report of the HO is an internal document of the Commission covered by the obligation of professional secrecy; consequently, it cannot be disclosed to parties[130]. Obviously, the interim report is not published differently from the final report.

It should represent an opinion which is required to be obtained *ex* art. 296 TFEU; under this point of view the situation is like the reasoned submissions of Advocate Generals, who are under a duty to make them on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement *ex* art. 252 (2) TFEU.

At the same way as the opinion of the Advocate General in judicial proceedings, the *interim* report is not binding in relation to the final decision as regards administrative procedure. In relation to the controversial issues coming from the *interim* report and the report issued by the case team, while due process issues raised by the HO are in most of the cases followed by the Commissioner, other kinds of substantial arguments may not be always endorsed.

In order to strengthen the right to be heard the new decision differently from the old one foresees that "the hearing officer may, after consulting the Director responsible, afford …the opportunity of

[126] In this sense art. 12 (4) of the decision 462/2001/EC stating that "the hearing officer shall fix a date by which such submissions may be made", by not taking into account comments received after that date.

[127] See The hearing office, Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU (*ex* articles 81 and 82 EC), 57.

[128] The report which concerns the conclusions coming from the oral hearing with regard to the right to be heard is communicated to the Director General as well as to the director responsible. At the contrary, in the old decision the HO had to report only to the director general; however, if appropriate, he could refer it to the Commissioner.

[129] House of Lords report: Strengthening the role of the hearing officer in EC competition cases, 1999 – 2000.

[130] Kerse, Khan, EC antitrust procedure, 2005. The hearing office, Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU (*ex* articles 81 and 82 EC), 63.

submitting further written comments after the oral hearing" [131]. Anyway, *ex* art. 13 (2) of the decision 462/2001/EC, the HO can make observations (even substantial) to the Commissioner on the further progress of the proceedings, highlighting, among other things, the need for further information, the withdrawal of certain objections, or the formulation of further objections[132]. The previous powers lead to consider the HO as an advisor to the Commissioner, by raising all substantive issues which might be interesting in order to improve the quality of the final decision[133].

Apart the HO which has the possibility to express its view in the *interim* report, another role is that of the Advisory Committee composed by the same persons representing the Member States at the oral hearing; the draft decision will be the object of the Advisory Committee's compulsory opinion which shall be after informed by the Commission to what extent it was taken into account.

After the opinion of the Advisory Committee, DG Competition makes a final draft approved by the legal service. Also here it has to be highlighted that the legal service is present at the hearing; its conclusions on the oral hearings may influence its approval of the draft prepared by DG competition.

After the *Chef du Cabinet* approves it, the final draft may be the object of one of the weekly meetings of the Commission[134]. During the latter, on the proposal of the Commissioner, the Commission approves by majority vote the final decision, by notifying it to the addressees and publishing it in the Official Journal[135].

Given that it is the college of Commissioners which decides, the influence of the other Commissioners may be decisive. It is important to say that other Directorates Generals may be invited at the oral hearing, so that their conclusions on the hearing may be considered by their Commissioners.

Finally, on the basis of the draft decision, the HO prepares a report on the respect of the right to be heard (final report), considering if the draft decision deals only with objections in respect of which the parties have been afforded the opportunity of making known their points of view. This report shall be attached to the draft decision of the Commission, ensuring that the latter knows all the

[131] Art. 12 (4) of the decision 462/2001/EC.

[132] According to art. 5 of the decision 462/2001/EC where it is stated that the HO contributes to the objectivity both of the hearing and of any decision.

[133] In this sense EC Commission XXXIV Report on competition policy (Commission 2004), 12.

[134] V. Korah, An introductory guide to EC Competition law and practice, 2000.

[135] The hearing office, Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU (*ex* articles 81 and 82 EC), 75, states that the HO "will decide on any disputes…that may arise during the publication process of the non-confidential version of the Decision".

information on the procedure and the right to be heard[136]. Also the final report is published in the Official Journal and sent to the addressees[137].

Once, a party complained that contrary to art. 8 of the decision 462/2001/EC, the HO had not answered to its request of access to the file made in the reply to the SO. In particular, the party questioned that the omission had not been considered in the final report (where the HO declared that the party had not raised any procedural issue), by not influencing in favour of the party the Commission decision. The Court answered that the HO is not obliged to communicate in the final report all procedural objections raised by parties during the procedure; based on art. 16 (1) of the decision 462/2001/EC, the obligation refers to all relevant information as regards the course of the procedure and respect of the right to be heard[138]. However, it seems particular that a request of access which is an integral part of the right to be heard does not represent a relevant information.

Other involved parties, complainants and third parties

The situation is different for the other parties involved in the procedure. In relation to "other involved parties" in merger proceedings, the Commission shall inform them in writing of the objections established in the SO (differently from notifying parties to whom the Commission shall address its objections), setting, at the same time, a time limit within which they may inform of their comments in writing[139].

The Commission shall, upon request, give them access to the file "in so far as this is necessary for the purpose of preparing comments" [140]; the HO is consulted when other involved parties are not satisfied about the access provided by the case team.

The Commission "shall also afford other involved parties who have so requested in their written comments the opportunity to develop their arguments in a formal oral hearing" [141].

As regards complainants, it is excluded a competence of the HO in defining the existence of a legitimate interest which is necessary in order to lodge complaints[142]. The legitimate interest is

[136] In this sense art. 16 (1) of the decision 462/2001/EC, specifying at paragraph 2 that in the light of any amendments to the draft decision up to the time the decision is adopted, the final report may be modified by the HO.

[137] The hearing office, Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU (*ex* articles 81 and 82 EC), 73 ss.

[138] T 236/01, Tokai carbon Co. Ltd / Commission, [2004], ECR II- 480, 53, on the basis of whereas 8 and artt. 15 e 16 (1) of the decision 462/2001/EC.

[139] Art. 13 (2) regulation No 802/2004.

[140] Art. 17 (2) regulation No 802/2004.

[141] Art. 14 (2) regulation No 802/2004.

[142] In the Final Report of the Hearing Officer in case COMP/36.571 – Austrian Banks, the HO points out its incompetence in qualifying legitimate the interest of a potential complainant in order to admit him to the proceeding *ex* art. 7 regulation No1/2003; the admission of the complainants is a decision of the Commission.

satisfied when complainants are being "directly and adversely affected by the alleged infringement" [143]. When the Commission decides to admit a complainant in the proceedings on the basis of its legitimate interest, *ex* art. 6 (1) regulation No 773/2004 "it shall provide the complainant with a copy of the non-confidential version of the statement of objection", setting a time-limit within which the complainant may make known its views in writing.

Legally speaking there is no right to access to file for the complainant[144]; under this point of view, a final report stated that the HO refused the complainant's access to file *ex* art. 8 of the decision 462/2001/EC, given that it did not exist any legal basis for the exercise of the right[145].

Anyway, a complainant who has received a letter *ex* art. 7 (2) of the decision 462/2001/EC believing that the Commission has documents necessary for the exercise of the right to be heard, it is entitled to the access by means of a reasoned request[146].

On the one hand, the complainant is invited to comment in writing on the statement of objections within a time limit specified by the Commission[147]. On the other hand, after requesting it in their written comments, "the Commission may, where appropriate, afford complainants the opportunity of expressing their views at the oral hearing of the parties to which a statement of objections has been issued" [148].

Applications to be heard orally shall be made in the written comments on letters which the Commission has addressed to him. In particular, art. 7 (2) c) of the decision 462/2001/EC refers to the letter "informing a complainant that in the Commission's view there are insufficient grounds for finding an infringement and inviting him to submit any further written comments" (the so called art. 7 letter). It would be more sensible to require them in the written comments released after issuing a SO in the context of the participation of complainants in proceedings[149].

Following a written request to the HO, it is possible to hear third parties showing a sufficient interest[150]. The HO may decide after consulting the director responsible whether to admit the third party to submit written comments following the evaluation of its interest[151].

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[143] Commission Notice on the handling of complainants by the Commission under artt. 81 and 82 of the EC Treaty, 34.

[144] The hearing office, Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU (*ex* articles 81 and 82 EC), 16.

[145] Final Report of the Hearing Officer in case COMP/36.571 – Austrian Banks.

[146] Art. 8 (1) of the decision 462/2001/EC. When the complaint does not lead to a SO, *ex* art. 8 (1) regulation No 773/2004 the complainant may request access to all non-confidential documents on which the Commission bases its provisional assessment. In case the complainant holds that the Commission has other useful documents in order to exercise the right to be heard, a further access may be sought by means of a reasoned request first to the case team and after to the HO.

[147] Art. 6 (1) regulation No773/2004.

[148] Art. 6 (2) regulation No 773/2004.

[149] At the art. 7 letter phase it is still not sure if the proceedings will start, so that it does not make sense an application to be heard orally.

[150] *Ex* art. 13 (1) regulation No 773/2004 and art. 16 (1) regulation No 802/2004 together with art. 6 (1) of the decision 462/2001/EC.

[151] In this sense art. 6 (2) of the decision 462/2001/EC.

Written applications to be heard from third parties are characterised by a statement explaining the applicant's interest in the outcome of the procedure[152]; if a sufficient interest has not been shown by the third party, he shall be informed in writing of the reasons, having, anyway, a time limit within which he may submit any further written comments[153]. In its *Schlüsselverlag* judgement, the CJ referred such definition to undertakings that are likely to experience an immediate change of their situation on the market or the markets concerned[154].

The discretionary decision of the HO seems to be limited by the implementing regulations[155]. However, even in case such a sufficient interest has not been shown, the Commission is still able to hear them; in fact, implementing regulations allow the Commission to invite any other person to express its views[156].

After showing a sufficient interest, the Commission shall inform third parties "of the nature and the subject matter of the procedure" [157]. On this point, the HO may decide, if requested, which documents are suitable at describing the nature and the subject matter of the procedure[158].

Also in this case according to regulations a right to access to file does not exist, even though art. 8 (1) of decision 462/2001/EC expressly sets out that a third party may require access to documents useful to draft written comments for the proper exercise of the right to be heard; the reference is to the letter *ex* art. 7 (2) b) of decision 462/2001/EC "inviting the written comments of a third party having shown sufficient interest to be heard".

After applying in writing[159], it "shall" be given them the opportunity of being heard in writing setting a time limit within which they may make known their views[160].

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[152] In this sense art. 6 (1) of the decision 462/2001/EC. The hearing office, Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU (*ex* articles 81 and 82 EC), 33, states that the HO "will take into consideration in particular the contribution the party has made or is likely to make to establish the truth and relevance of the facts and circumstances pertinent to the proceedings".

[153] In this sense art. 6 (3) of the decision 462/2001/EC.

[154] C-170/02, Schlüsselverlag J.S. Moser and Others / Commission, [2003] ECR I-9889, 27.

[155] In particular, according to whereas 11 regulation No 773/2004, "consumer associations that apply to be heard should generally be regarded as having a sufficient interest, where the proceedings concern products or services used by the end consumer, or products or services that constitute a direct input into such products or services".
In the same way, art. 11 c) regulation No 802/2004, state that "third parties are natural or legal persons, including customers, suppliers and competitors, provided that they demonstrate a sufficient interest within the meaning of article 18 (4) second sentence of regulation No 139/2004, which is the case in particular: for members of the administrative or management bodies of the undertakings concerned or the recognised representatives of their employees; for consumer associations, where the proposed concentration concerns products or services used by final consumers"

[156] Both art. 13 (3) regulation No 773/2004 and art. 16 (3) regulation No 802/2004.

[157] According to both art. 13 (1) regulation No 773/2004 and art. 16 (1) regulation No 802/2004.

[158] Final Report of the Hearing Officer in case COMP/C – 1/37.451, 35.578, 35.579– Deutsche Telekom, stated that an interested third party was informed of the nature and the subject matter of the procedure through a non-confidential version of the SO. From Final Report of the Hearing Officer in case COMP/M.2978 – Lagardere/Natexis/VUP, it is deduced that copies of non-confidential version of the SO together with the written replies of the notifying parties had been sent to the interested third parties.

[159] Art. 6 (1) of the decision 462/2001/EC.

[160] Art 27 (3) regulation No1/2003 and art. 18 (4) regulation No139/2004. Art. 13 (1) regulation No 773/2004 and art. 16 (1) regulation No 802/2004.

After requesting in their written comments, "the Commission may, where appropriate, invite persons referred to in paragraph 1 to develop their arguments at the oral hearing" [161]. Art. 7 (1) of decision 462/2001/EC states that "applications to be heard orally shall be made in the applicant's written comments on letters which the Commission has addressed to him". In particular, with reference to third parties, article 7 (2) b) of decision 462/2001/EC refers to the letter "inviting the written comments of a third party having shown sufficient interest to be heard".

Based on a literal interpretation of the implementing regulations, requests for an oral hearing may not be accepted by the Commission[162]; under this point of view, the CJ recognised to the Commission a reasonable margin of discretion[163].

CONCLUSIONS

In the current system the Commission pursues the public interest in avoiding the infringements of antitrust rules. The principle of proportionality requires that measures adopted by the Commission should not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the TFEU[164]; consequently, the legitimate objective of safeguarding competition in the common market should be reached in respect of the truth, above all after considering that the Commission is a public institution.

The Charter of fundamental rights of the European Union refers to the right to good administration, providing that "every person has the right to have his or her affairs handled impartially, fairly…by the institutions, bodies, offices and agencies of the Union" [165]. At the same way, the general principle of sound administration requires that the Commission examine with care and impartiality the facts and legal arguments put forward[166].

In the accusatorial, prosecutorial or adversarial systems, proceedings are started by the prosecutor against the defendant before an impartial judge.

Under the European Union courts' point of view, it is highlighted "the adversarial nature of the administrative procedure applying the competition rules of the Treaty" reflected by the preliminary

[161] Art. 13 (2) regulation No773/2004 and art. 16 (1) regulation 802/2004.
[162] Both art. 13 (2) regulation No773/2004 and art. 16 (2) regulation No802/2004.
[163] C 43 and 63/82, Dutch books , [1984] ECR 19, 18.
[164] C 9/73, Schluter / Commission, [1973] ECR 1135, 22. K Lenaerts and P. Van Nuffel, Constitutional law of the European Union, 2005.
[165] T-54/99 max.mobil.Telekommunikation Service / Commission [2002]ECR II-313,48 and 53.
[166] With reference to the complaints T 7/92, SA Asia motor France / Commission, [1993] ECR II-669; T 206/99, Metrople television SA / Commission, [2001] ECR II-1057, 58.

nature of the SO[167]. In the adversarial proceedings characterising antitrust cases, the undertakings concerned are opposed to the Commission services[168].

Anyway, despite the opinion of the European Union courts, it seems clear that the system is inquisitorial rather than adversarial[169]; that is why the same HO was created in order to guarantee objectivity to subjective proceedings coming from the triple role of the Commission.

When administrative procedures are inquisitorial, the prosecutor is also the judge. In the latter system the matter of prosecutorial bias manifests its negative effects on the accuracy of the Commission decision. In this context the figure of the HO may become paramount in order to minimise the risk of prosecutorial bias.

Apart from the staff available, its effectiveness may depend on the independency of the figure in question. Its independency is directly connected with the objectivity of the procedure; it means that the greater is its independency the more proceedings will be objective.

On the basis of the Commission decision 462/2001/EC, "the hearing officer should be appointed in accordance with the rules laid down in the staff regulations of officials and the conditions of employment of other servants of the European Communities. In accordance with those rules, consideration may be given to candidates who are not officials of the Commission".

The rank of the HO should be set up to a director level in order to guarantee a greater independence; the relation of the HO with the directors imposed by the decision 462/2001/EC advises to place the former on an equal footing with the latter.

However, in practice it may be risky on the basis of the art. 50 of the regulation concerning the Commission staff, where it is stated that the Commission may fire officials from director level in the interest of the service; it means that a director behaving as objectively as possible might be vulnerable to this clause when its independent conduct could disturb the implementation of competition policy.

In order to guarantee more independency than that established by the last Commission decision, it has been suggested to settle him down at the Presidency of the Commission as it already happens for the legal service. It has also been suggested to look at the administrative procedure before the Federal Trade Commission in order to raise the value of the HO, by enabling the latter to issue decisions rather than non binding reports; in particular, the reference is to the Administrative Law Judge that is an independent employee issuing an initial decision after conducting a trial between a Complaint Counsel representing the Federal Trade Commission and the undertaking[170].

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[167] T 191/98, T 212/98 and T 214/98, Atlantic Container Line and others / Commission [2003] ECR II-3275, 121.

[168] C 204/00 and others, Aalborg Portland and others / Commission, [2004] ECR I 123, 95.

[169] S. Bentch, Confidentiality, corporate counsel and competition law: representing multinational corporations in the European Union, 35 St. Mary's L. J. 1003, 2004.

In addition, a comparison with the latter system shows that when a decision is appealed to the Federal Trade Commission all the skilled Commissioners sit as judges hearing directly both sides; on the contrary, in the European system non skilled Commissioners decide on the basis of a proposal submitted by the Commissioner for competition who has not attended himself the hearing[171].

Apart from improving the system of checks and balances with among the others the HO, a complete adversarial system would imply the adoption of the American solution where the antitrust authority prosecutes before an independent court. It would see a European Commission keeping the role both of investigator and of public prosecutor in adversarial proceedings with the parties before the European Union courts; in the USA under the pre merger notification programme the Department of Justice or the Federal Trade Commission investigates and prosecutes before a federal court[172]. Certain proposed concentrations must be notified to the two institutions before their implementation; whether the American institutions are concerned about the impact on competition, they seek an injunction in a federal district court in order to forbid the merger[173].

Such a solution would also solve the problem of the prosecutorial bias inherent in the European system; prosecutorial bias do not arise when the antitrust authority prosecutes before an independent court. In fact, it has been stated that the issue of prosecutorial bias manifests itself when the prosecutor is also the judge; the phenomenon may certainly influence the accuracy of the Commission decision[174].

Empirical evidence may show the existence of prosecutorial bias, when the high number of errors in the Commission decisions cannot be explained by other reasons. An analysis carried out shows that a high percentage of the Commission decisions were totally or partially annulled[175]; considered that

[170] T. Linder, Procedural aspects of EC competition law, 2004, proposes to entrust the HO with the competence to decide cases, by applying the Administrative Law Judge to the European system. Also I. Forrester, Due process in EC competition cases: a distinguished institution with flawed procedures, ELR, 2009, 817, says that "endowing the hearing officers with more important functions would be a step in the right direction".

[171] See I. Forrester, Due process in EC competition cases: a distinguished institution with flawed procedures, ELR, 2009, 817, who says that "there is the institutional possibility that political consideration will influence... the decision making".

[172] The Department of Justice has an Antitrust Division governed by the Assistant Attorney General whose responsibility is the antitrust enforcement; it has competence both for criminal and civil cases. The Federal Trade Commission is composed by 5 independent and expert Commissioners appointed for seven years; in particular, the Bureau of Competition refers to merger and antitrust violations with powers limited to cease and desist orders.

[173] In the USA, an action against a federal district court's judgement may be brought before the court of appeal on legal grounds. The Supreme Court may review the court of appeal's judgement on legal grounds, when an important legal issue is at stake.

[174] Wouter P. J. Wils, The combination of the investigative and prosecutorial function and the adjudicative function in EC antitrust enforcement: a legal and economic analysis, World competition 27 (2), 2004, carried out an interesting analysis on the topic, by referring to economics and psychology. He considers three sources of prosecutorial bias that is confirmation bias, hindsight bias and desire to justify past efforts, and finally the desire to show a high level of enforcement activity.

[175] From January 2000 to March 2005, 73 judgements were adopted by the Community courts in relation to the legality of Commission decisions, whose 60 in antitrust and 13 in merger field. A CFI judgement followed by the ECJ decision has been considered as a single case, because of the fact that they refer to the same Commission decision which is the

the level of expertise of the persons involved is not in doubt, the lack of accuracy may be due to prosecutorial bias[176].

Of course, the system of checks and balances could minimise the risk of prosecutorial bias; nevertheless, the problem would not be fully solved. At the same way, external checks and balances in the form of judicial review are beneficial in order to avoid the risk of prosecutorial bias; however, in this case the risk of prosecutorial bias could be completely eliminated after granting a full (and fast) jurisdiction to the court[177]. Apart from the unlimited jurisdiction granted for fines *ex* art. 261 TFEU, the GC has a full control of facts and law as well as a restrained control of the complex economic matters limited to the test of manifest error of appraisal or misuse of powers[178].

The lack of full jurisdiction prevents the court from remaking the Commission decision previously annulled; *ex* art. 266 TFEU "the institution whose act has been declared void…shall be required to take the necessary measures to comply with the judgement of the Court of Justice of the European Union". Under this point of view it has been proposed to confer full jurisdiction to the GC[179].

It has also been said that the speed of the judicial review is a complementary factor to the full jurisdiction in order to eliminate prosecutorial bias. A solution could be found through art. 257 TFEU stating that "the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish specialised courts attached to the General Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas"; while a specialised court has already been created with reference to the officials, another one was expected in relation to trade marks[180].

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object of the judicial procedure. At the same way, in case a Commission decision refers to several companies, all the actions brought to the court leading to different judgements are considered as one case. Orders and preliminary rulings have not been considered.

Judgements totally upholding a Commission decision were 33, whose 26 in antitrust and 7 in merger field.

Judgements totally annulling Commission decision were 15, whose 10 in antitrust and 5 in merger field.

Judgements partially annulling Commission decision were 25, whose 24 in antitrust and 1 in merger field.

[176] B. Vesterdorf, Judicial review in EU and US antitrust law. Reflections on the role of the Community courts in the EC system of competition law enforcement, in UCL Annual antitrust and regulation forum, 2005, after considering that since 1989 the GC annulled (totally or partially) 28% of antitrust and merger decisions for which an action was brought, he held that it was due to the effectiveness of the judicial control rather than to the negative job of the Commission.

[177] Wouter P. J. Wils, The combination of the investigative and prosecutorial function and the adjudicative function in EC antitrust enforcement: a legal and economic analysis, World competition 27 (2), 2004, considers that when the judicial review is not complete, "the risk of prosecutorial bias remain unaltered with respect to those assessments"; with reference to the time lag between decision and judgement, he states that "the beneficial effect of the judicial review in neutralising the risk of prosecutorial bias is weakened".

[178] T 25/95, Cimenteries CBR / Commission, [2000] ECR II-491, 719 ; T 44/02, Desdner Bank Ag, [2006] ECR II-8657, 67; C 42/84, Remia [1985] ECR -2585, 26; T 65/98, Van den Bergh Foods Ltd., [2003] ECR II-4653, 135.

[179] B. Vesterdorf, Judicial review in EU and US antitrust law. Reflections on the role of the Community courts in the EC system of competition law enforcement, in UCL Annual antitrust and regulation forum, 2005.

[180] B. Vesterdorf, Judicial review in EU and US antitrust law. Reflections on the role of the Community courts in the EC system of competition law enforcement, in UCL Annual antitrust and regulation forum, 2005, which considered also *ex* art. 225 EC Treaty the possibility of a judicial panel in competition matter or the creation of specialised chambers in the existing structure of the GC.

By returning to the main proposal seeing the European Commission prosecuting before the European Union courts, it is also necessary to look at the efficiency of the solution. The optimal enforcement system is that achieving maximum accuracy at minimum administrative costs; the latter concept refers to all costs borne by the society including both public and private costs. Even if it is normally stated that the current system is less costly than that proposed, such an advantage is less obvious after looking at the internal checks and balances. The latter conclusion is strengthened on the basis of the fact that many Commission decisions are appealed; in addition, when the appeal leads to annul the decision, the Commission has to start another administrative procedure *ex* art. 266 TFEU[181].

Considered that competition law is excluded from the hardcore of criminal law because antitrust violations "do not carry any significant degree of stigma"[182], the European Court of Human Rights held that proceedings before administrative authorities are consistent with the ECHR provided that adequate safeguards are contemplated during the administrative phase and actions for annulment may be brought before "a judicial body that has a full jurisdiction, including the power to quash in all respects, on questions of fact and law, the challenged decision"[183]. Whether the judicial review carried out by the EU courts complies with the ECHR requirements, the situation is uncertain[184]. Anyway, the solution proposed would comply more with art. 6 ECHR which refers to "a public hearing by an independent and impartial tribunal", by not being satisfied with the current system seeing the triple role of the Commission with a hearing (not public) in the absence of the final decision makers[185].

[181] Wouter P. J. Wils, The combination of the investigative and prosecutorial function and the adjudicative function in EC antitrust enforcement: a legal and economic analysis, World competition 27 (2), 2004, which holds at the end that a cost advantage is in favour of the solution proposed rather than the actual one.

[182] ECHR, Jussila, [2006], 46; ECHR, Bendenoun, A/284, [1994], 46.

[183] ECHR, Bendenoun, A/284, [1994], 46; ECHR, Deweer, A/35, [1979-1980], 49; ECHR, Ozturk, [1984], 49-50; ECHR, Bryan, [1996], 37-38; ECHR, Janosevic, , [2003], 81; ECHR, Schmautzer, [1996], 36.

[184] In this sense G. Di Federico, The impact of the Lisnon Treaty on EU Antitrust Enforcement:Enhancing procedural guarantees through article 6 TEU, stating, anyway, that "nothing in the case law of the EctHR suggests that the reviewing court must be entitled to deal *de novo* with the case".

[185] D. Waelbroeck and D. Fosselard, Should the decision making power in EC antitrust procedures be left to an independent judge? – The impact of the European Convention on human rights on EC antitrust procedures, 1994, 14 Yearbook of European law.